88-1655

NO. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

JOHN W. SOWERS,
Pro Se

VS.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JOHN W. SOWERS
PRO SE

MARCH 1984

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Tenth Circuit Court of Appeals has denied the Petitioner his Sixth Amendment right to effective counsel when it denied the Petitioner's habeas corpus petition.

2. Whether the Tenth Circuit Court of Appeals has effectively denied the Petitioner his Sixth Amendment right to effective counsel by; first, denying the Petitioner his substantive right on direct appeal due to counsel's negligence and; second, by denying the Petitioner his post-conviction remedy because of counsel's incompetence.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Petitioner (defendant below) seeks a Writ of Certiorari to review the opinion of the United States Court of Appeals for the Tenth Circuit entered below.

The case below was styled *United States of America* vs. *John W. Sowers* and was decided on January 12, 1984.

OPINIONS AND ORDERS BELOW

The Opinion of the United States Court of Appeals for the Tenth Circuit is unpublished and can be found herein in Appendix 'C' (Order of January 12, 1984). Certain relevant opinions and orders of the United States District Court for the Western District of Oklahoma are unpublished but appear herein as Appendix 'B' (Order of 1983). Another relevant unpublished opinion of the United States Court of Appeals for the Tenth Circuit can be found herein as Appendix 'A' (Order of March 15, 1982).

The Petitioner believes jurisdiction to hear this action is conferred upon this Court by 28 U.S.C. § 1254 (1). Moreover, this court is not denied jurisdiction to hear this habeas corpus case because the

Petitioner is presently on parole. Today, the habeas corpus petition may be brought when there is a restraint of liberty, *Carafas v. Lavaller*, 391 U.S. 234, 238-239, 88 S. Ct. 1556, 20 L. Ed. 2d 554 (1968).

The Opinion of the Court of Appeals for the Tenth Circuit was entered on January 12, 1984.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the Sixth Amendment to the United States Constitution, which states in its entirety:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

In addition, this action was brought under the provisions of 28 U.S.C. §2255, which states in its entirety:

"A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

"A motion for such relief may be made at any time.

"Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or

that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

"A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

"The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

"An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

"An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention."

STATEMENT OF THE CASE

The Petitioner, John W. Sowers, was indicted in the Western District of Oklahoma on February 7, 1980. The indictment charged the Petitioner, an attorney from Kansas, with ten counts including: conspiracy, Title 18, United States Code, Section 1341; wire fraud, Title 18, United States Code, Section 1343; and interstate transportation of property obtained by fraud, Title 18, United States Code, Section 2314. The indictment stemmed from the "Mayan God Project", a contractual arrangement to solicit funds and sell interests in stone sculptures that were purchased in Guatemala. The contractual agreement between those charged named the Petitioner as escrow agent, along with defendant Ovid Kosovsky, and co-conspirator Robert Bolton as principals. A fourth person not named in the contract but indicted as a co-conspirator was Raymond Bean, who was selling interests through Bolton under the contract. Defendant

Kosovsky was to obtain the stone sculptures in Guatemala. Co-conspirator Bolton was to provide the funds to purchase them. Petitioner, as escrow agent, was to hold the sculptures until both principals, i.e., Bolton and Kosovsky, fulfilled their obligations under the contract.

A short time prior to the trial, the co-conspirators, Bolton and Bean, pled guilty to related charges named in the indictment. The day before trial, co-defendant Kosovsky also pled guilty.

Because of the length of the case, the complexity of the evidence presented, and for the convenience of the court, a certified copy of the trial transcript has been submitted to the Court.

During the Petitioner's three and one-half week trial, which commenced on June 17, 1980, in the United States District Court for the Western District of Oklahoma, the government put on twenty-four witnesses and approximately one hundred and ninety (190) exhibits.

The tenor of the trial was established the very first day when the government called Donald Baird, an investor in the alleged fraudulent scheme. On direct examination, Mr. Baird testified that he gave $12,500 to Bolton as an investment in the Mayan God Project, although he did not know what the Petitioner was to receive, if anything, from the investment money (Tr. 119). On cross-examination, defense counsel properly illicited from Baird that the Petitioner did not draw up the agreement that Baird signed (Tr. 164), nor did Petitioner have any contact with Baird until the day he signed the agreement with Bolton (Tr. 172). Furthermore, the agreement provided for co-conspirator Bolton to pay Baird back, not the Petitioner (Tr. 171). Nevertheless, the prosecutrix immediately began to offer exhibits that had nothing to do with the Petitioner (Tr. 130). They were neither drawn by him, signed by him, nor seen by him (Tr. 133). Furthermore, the trial judge conditionally admitted the exhibits subject to being linked-up later (Tr. 136) At the end of Baird's testimony, when the Petitioner's defense counsel objected to relevancy, the court gave a cautionary instruction relating to co-conspirator statements (Tr. 210).

The government's next witness was Dr. Raymond Thompson, an archaeologist from the University of Arizona. Before Dr. Thompson testified, the Petitioner's defense counsel objected to his testimony on the ground that the doctor's testimony was irrelevant and prejudicial. Dr. Thompson was to testify that another investor in the Mayan Project brought a stone object to him which he labelled as fake (Tr. 211). The Petitioner's defense counsel argued at the bench conference that indeed this evidence could not be connected to Petitioner because he was never told of this finding nor was there evidence that this stone object was one of the stones related to the alleged fraud scheme (Tr. 213). The government's counsel argued it could be traced to the Petitioner and that the tracing would be linked-up later in the case (Tr. 212). The trial judge conditionally overruled defense counsel's objection on the ground that the evidence would be linked-up later (Tr. 216).

The government prosecutrix argued at the bench conference that Dr. Thompson was to testify to the authenticity of the stone sculptures, however, the first substantive question she asked was whether it was illegal to bring the stone sculptures into this country (TR. 225). The Petitioner's defense counsel objected on the grounds that Dr. Thompson was not a legal expert nor was the Petitioner charged with bringing these stones illegally into the country (TR. 227). The court responded that a cautionary instruction would be given (TR. 227). Dr. Thompson testified that he never had any contact with Petitioner (TR. 238).

The next witness that was brought to the stand was an investor in the Mayan God Project, Eugene Kralik. Kralik testified that he was originally contacted by Mr. Simmons and decided to invest in the project (Tr. 300). He testified that he originally met with Simmons and Bolton prior to investing (Tr. 301) and later with the Petitioner subsequent to the signing of the investment agreement (Tr. 427, 429). To this testimony on direct examination the court once again gave a cautionary instruction regarding co-conspirator hearsay even though the Petitioner's counsel made no relevant hearsay objection (Tr. 380).

The next investor-witness called by the government was David Brouse. As previously stated, Brouse first learned of the project

through other investors, namely Bolton, a Mr. Massey, and a Mr. Eugene Anderson (Tr. 445). Brouse called the Petitioner one time before he signed the agreement to invest with Bolton and spoke to him twice following the execution of the agreement (Tr. 459). Brouse testified that the Petitioner knew so little about the agreement between Brouse and Bolton that he sent a letter to Brouse to find out the exact terms of this agreement (Tr. 472). Moreover, Brouse further testified that he received a letter sent by Petitioner to Bolton which related the Petitioner's fears that Bolton was grossly violating the terms of the contract between Bolton and Kosovsky (Tr. 537). Along with Brouse and Bolton, the Petitioner sent copies of this letter to Anderson, Baird, Kralik, Bean, and Enegren (Tr. 544). On the Petitioner's counsel's request, the trial court gave a cautionary instruction relating to co-conspirator hearsay (Tr. 553). However, Petitioner's counsel did not lodge a hearsay objection at this point. Again, the court allowed this hearsay to be admitted subject to link-up by the government.

Another government witness whose testimony related to the authenticity of the art objects was a Mr. Mike Mayfield, the Chief of the Division of Museums for the State of Wyoming (Tr. 702). Again, the government prosecutrix sought to illicit the law on "illegal importing" although it was not relevant to the charges brought against the Petitioner (Tr. 722). Once again, the trial court allowed the admission of this evidence on a cautionary instruction (Tr. 739).

The next investor called to the stand was Mr. Edgar Dwire, an attorney who worked in the same community as the Petitioner. Although Dwire spoke of the Petitioner very highly during his testimony (Tr. 755) and stated that at no time was he told by the Petitioner that the art objects were authenticated (Tr. 747). The prosecutrix strenuously attempted to force Dwire to tell the jury that Petitioner was a dishonest man because he did not relate his knowledge that the objects were fake (Tr. 748-753). Dwire also testified that when he told Petitioner that the Federal Bureau of Investigation had contacted him about the art objects, the Petitioner told him to "tell the truth" (Tr. 768). At this point the prosecutrix attempted to have Dwire read to the jury documents that he had never seen prior to trial in an attempt to impeach Dwire, their witness (TR. 782-789). In response to defense counsel's objection, the prosecutrix asserted that they could

establish the document's relevancy if the court would allow them to be admitted provisionally (Tr. 782). The trial court allowed this evidence to be admitted subject to link-up (Tr. 790), as they had done with much of the prior evidence.

The next investor that was called by prosecutrix was a Mr. Ronald Warner, a president of a small plastics company in Alabama. It was through Warner's testimony that the type and amount of hearsay testimony can be graphically illustrated (Tr. 804). From the beginning to the end, Mr. Warner said little about the Petitioner but stated volumes of hearsay relating to other co-conspirators (Tr. 806, 810, 814, 815, 817). Warner testified that at one point during the period of his involvement, the Petitioner stated that he was having problems due to the actions of Bolton (Tr. 820, 821). Although counsel for Petitioner made relevancy objections, he made no hearsay objections during Warner's testimony. During Warner's testimony the court again allowed the prosecutrix to conditionally admit exhibits (Tr. 817) accompanied by another cautionary instruction relating to hearsay subject to link-up (Tr. 831).

At this point, it is unnecessary to examine in detail the testimony of the remaining government's witnesses because throughout the remainder of the trial the same objections to relevancy were made by Petitioner's counsel and the same cautionary instructions relating to both co-conspirator hearsay and plain hearsay were made (Tr. 836, 862, 908, 911, 916, 931, 980, 1395, 1418). The trial court did show concern over the deluge of evidence, and the amount of hearsay admitted (Tr. 1130-1135, 1856-1858). However, the case was submitted to the jury without the requisite findings commanded by *United States v. Radeker*, 664 F. 2d 242 (10th Cir. 1981).

The trial court acquitted the Petitioner on two of his ten counts and the jury convicted the Petitioner of six of the remaining eight counts, being unable to reach a decision on the other two counts. On September 8, 1980, Petitioner was sentenced to six concurrent terms of two and one-half years imprisonment.

The Petitioner then sought a direct appeal in the Tenth Circuit in case number 80-1974. The Tenth Circuit rejected the Petitioner's

claims of failure to interview jurors post-conviction regarding possible misconduct, insufficiency of the evidence, and improper admission of co-conspirator hearsay. (See Appendix 'A')

Subsequent to the Petitioner's direct appeal to the Tenth Circuit, the Petitioner filed three Motions to Reduce Sentence pursuant to Rule 35, *Federal Rules of Criminal Procedure*. All three motions were denied by the trial court.

Petitioner then sought post-conviction relief pursuant to Title 28, *United States Code*, Section 2255, asserting the grounds of prejudicial joinder of co-conspirators; ineffective counsel; bias on the part of the trial court; and prosecutorial misconduct. Both the District Court and the Tenth Circuit Court of Appeals denied the Petitioner relief. *(See* Appendix "B" and "C")

REASONS FOR GRANTING THE WRIT

The Court Below Has Decided An Important Constitutional Question Severely Limiting Petitioner's Right to Reasonable and Competent Counsel.

It is fundamental that citizens of the United States are guaranteed the right to effective assistance of counsel by the Sixth Amendment of the United States Constitution. It is also fundamental that Petitioner's legal representative's failure to comply with the requisites for reasonable and competent counsel comprises that guaranteed right.

The standard used in determining whether defense counsel's representation falls below that level required to preserve the Petitioner's Sixth Amendment right was succinctly stated in *Dyer v. Crisp*, 613 F. 2d 275 (10th Cir. 1980) as being: "The Sixth Amendment has been interpreted as guaranteeing effective assistance of counsel." *Id.* at 278 "The Sixth Amendment requires that assistance of counsel be measured against a standard higher than "sham or mockery" and rise to a level of reasonably competent assistance of counsel." *Id.* Petitioner recognizes that the reasonable and competent standard enumerated in *Dyer* does not require perfect or errorless representation. *United States v. Crouthers*, 669 F. 2d 635, 642 (10th Cir. 1982). However, Petitioner asserts that counsel's representation

falls well below the reasonable and competent standard demanded by *Dyer*. The consequences of this ineffective representation by defense counsel was to deny Petitioner's right to effective assistance of counsel as guaranteed by the Sixth Amendment. *CP. Dyer v. Crisp* with *United States v. Cronic*, 675 F. 2d 1126 (10th Cir. 1982).

Petitioner also recognizes that inexactness of the definition of "effective counsel". This generality is displayed in *United States v. Nolan*, 571 F. 2d 528 (10th Cir. 1978). Here, the court does not define effective representation, but instead lists that which will not constitute a proper claim under "ineffectiveness of counsel":

> "It is our opinion that absent the incompetence of counsel or some other exceptional circumstance, a defendant will be bound by decisions of his counsel. Mistakes of judgment on the part of counsel or mistakes of tactics, strategy or policy in the course criminal trial do not constitute grounds for a later collateral attack pursuant to section 2255."

Id at 534.

The main thrust of Petitioner's contention is that numerous errors unaddressed by defense counsel at trial constitute the exceptional circumstances of *Nolan* and clearly show that defense counsel's incompetence has rendered the Petitioner's representation ineffective.

In *McMann v. Richardson*, 397 U.S. 759, 90 S. Ct. 1441, 25 L. Fed. 2d 763 (1970) this court indicated that the proper procedure for reviewing defense counsel's actions would not be a retrospective approach, but would be "whether that advice was within the range of competence demanded of attorneys in criminal cases." *Id*. at 773. In addition to the case law above, it is also comprehensible that a lack of evidence or a failure to show prejudice will not establish a claim of ineffective counsel.

In *United States v. Kobrosky*, 711 F. 2d 449 (5th Cir. 1983), where the Petitioner alleged ineffective assistance of his trial counsel, the Court of Appeals ruled that the District Court's denial of the Petitioner's motion to withdraw his guilty plea was not an abuse of discretion. The Circuit Court emphasized that: "No extrinsic evidence was offered either to buttress the allegations of ineffectuality or

to counter the government's protest that it would be significantly prejudiced were Kobrosky allowed to withdraw his plea." *Id.* at 457. In contradistinction to *Kobrosky*, the record in the case at bar clearly reveals that this case is rift with evidence that defense counsel's representation does not even approach the minimal requirements of the reasonable and competent standard. *See United States v. Hinton*, 631 F. 2d 769 (D.C. Cir. 1980). The Petitioner does not deny that defense counsel made numerous objections at trial, cross-examined witnesses, and presented evidence. Petitioner also recognizes that these practices are factors that weigh heavily in the court's determination of whether counsel has acted reasonably and competently. However, the salient point of Petitioner's argument is that although defense counsel employed the above mentioned practices, he failed to interpose these and other tactics at the critical points in the trial fundamental to Petitioner's defense. While the Petitioner is cognizant that such inaction may be within defense counsel's permitted trial strategy, he asserts that failure to implement these functions during these crucial points of trial clearly removes his inaction from the realm of trial strategy and squarely places them within the ambit of ineffectiveness.

The essential element of the Petitioner's defense as produced by his counsel was that Petitioner was unaware that the art objects were false. On the other hand, the prosecutrix produced three expert witnesses at the trial who testified as to their opinions of the lack of authenticity and newness of the objects of art. Petitioner made numerous requests of defense counsel to secure as a witness, Mr. Mohammed Moghbel, a recognized national museum restoration expert, Norman, Oklahoma, who expressed an opinion to the effect that the stone sculptures of Petitioner, which he had examined, were very, very old in age. An opinion which Petitioner relied upon heavily. Defense counsel, even after receiving $500 from Petitioner for the stated purpose of interviewing this and other critical witnesses, failed to do so (See Appendix 'D').

In *Buckelew v. United States*, 575 F. 2d 515 (5th Cir. 1978), the Fifth Circuit Court of Appeals addressed an allegation of ineffective counsel which was based on defense counsel's failure to produce a witness. The court's response to appellant's assertion was that: "complaints of uncalled witnesses are not favored because the

presentation of testimonial evidence is a matter of trial strategy and because allegations of what a witness would have testified are largely speculative. *Id.* at 521. The instant case is clearly distinguishable from *Buckelew*. The expert witness that Petitioner requested defense counsel to call was not an out of state witness as in *Buckelew*. Furthermore, Petitioner had detrimentally relied on Moghbel's opinion as an expert that the stone sculptures were authentic. The prosecutrix whole case was based on whether the stone sculptures were false and whether Petitioner had knowledge of such facts. In light of Petitioner's earlier reliance on Moghbel's opinion and his consistent assertion that he had no knowledge that the stone sculptures were only copies, clearly takes this proposed witness' testimony outside the spectrum of speculation (*See* Appendix 'D'). It is obvious that the failure of defense counsel to call to interview or to call this prospective witness after petitioner's request to do so amounts to behavior uncommensurate with that of a reasonable and competent attorney.

In addition to defense counsel's failure to present a substantive witness for Petitioner, on several occasions during trial it was brought to both counsel and the court's attention that specific instances of jury misconduct had occurred (Tr. 2837). At the outset of this misconduct, defense counsel moved for a mistrial, which was subsequently denied (Tr. 2911). Although the record makes it clear that defense counsel made this motion, it also makes it clear that he failed to pursue the several remaining instances of jury misconduct (Tr. 2917, 2918, 2938). This failure was especially fatal because the impropriety on the part of the jurors clearly influenced their opinions.

In *Irvin v. Dowd*, 366 U.S. 717, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1960) this court stated, "the test is "whether the nature and strength of the opinion formed are such as in law necessarily raise the presumption of partiality. The question thus presented is one of mixed law and fact. The affirmative of the issue is upon the challenger. Unless he shows the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality, the judgment need not necessarily be set aside. If a positive and decided opinion had been formed, he would have been incompetent even though it had not been expressed." *Id.* at 756. (Citing *Reynolds v. United States*, 98 U.S. 145, 25 L. Ed. 244 (1878).

In the case at bar, partiality clearly existed because the one juror holding out, Mr. Simmons, was referred to as being "a stubborn black" (Tr. 2871). Several jurors formed the opinion that he would be trouble from the start (Tr. 2856). This negativism toward juror Simmons, the only black juror, because of his belief in Petitioner's innocence was transferred to Petitioner, and resulted in the guilty verdict. Furthermore, juror Golightly was heard several times telling alternate juror Bowman what the jury count was during the deadlock (Tr. 2837, 2917, 2938). This incident is directly analogous to *United States v. Jones*, 696 F. 2d 479 (7th Cir. 1982), where this Court of Appeals ruled that the defendant was tried by an impartial jury because: "The trial judge in each instance questioned the potential jurors regarding the sensitive areas surrounding the trial, including the facts that drugs were involved and that one or both of the defendants might choose to not testify at trial. Except for the two dismissed panel members, no juror displayed prejudice. Moreover, neither defendant pressed for dismissal of any panel member other than those that eventually were dismissed."

In the case at bar, defense counsel did not seek to have any juror replaced by the alternate jurors available, nor did he attempt to carry forth the challenge as required by *Irvin*, 366 U.S. at 717.

Defense counsel, in his vain attempt at representation, furthered his ineffectiveness by his blatant failure to take any action during the prosecution's closing argument. It is well settled law that a prosecutrix while allowed to draw reasonable inferences and conclusions from the evidence, cannot misstate the facts or mislead the jury. In *Berger v. United States*, 295 U.S. 78, 55 S. Ct. 629, 79 L. Ed. 2d 1314 (1935) this court stated: "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done."

Id. at 88.

This court further concluded that, "a new trial was in order where the prosecuting attorney overstepped the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense as shown by the

record. He was guilty of misstating the facts in his cross-examination of witnesses; of putting into the mouths of such witnesses things which they had not said; of suggesting by his questions that statements had been made to him personally out of court, in respect of which no proof was offered; of pretending to understand that a witness had said something which he had not said and persistently cross-examining the witness upon that basis; of assuming prejudicial facts not in evidence; of bullying and arguing with witnesses; and, in general, of conducting himself in a thoroughly indecorous and improper manner." *Id.* at 84.

In the case at bar the prosecutrix made repeated misstatements of material fact. She constantly referred to Petitioner as a "liar" and a "phoney" (Tr. 2718, 2727, 2733) and sought to include in the record facts not in evidence at the trial (Tr. 2722, 2724, 2730, 2790, 2791, 2792, 2795, 2796). Her actions were more prejudicial in volume and substance than those contemplated by this court in *Berger* (CF Tr. 130, 225, 227, 722, 748-753, 782-789). Although defense counsel objected to some misstatements of fact made by the prosecutrix, he failed to ask the court for a curative instruction. *See United States v. Farnkoff*, 535 F. 2d 661 (1st Cir. 1976). He further failed to object to the prosecutrix's repeated attacks that Petitioner was "a liar" and was "a phoney" (Tr. 2718, 2727, 2733). Granted, in a case where a curative instruction was given or where the case evidenced overwhelming proof against the defendant, such statements would not constitute prejudicial error. But, in the present case, the government's case was far from overwhelming, no curative instruction was given, and the jury could easily be swayed because of the deluge of exhibits and length of the trial. Moreover, the validity of Petitioner's truthfulness was of paramount issue in determining whether he intended to defraud investors. *See United States v. Carroll*, 678 F. 2d 1208, 1210 (4th Cir. 1982); *United States v. Singer*, 660 F. 2d 1295, 1305 (8th Cir. 1981). As such, the result of the non-action of Petitioner's defense counsel in regard to prosecutrix's repeated improper remarks, insinuations, and misstatements of evidence could only cause the Petitioner to be denied a 'fair trial' and to be denied effective assistance of counsel.

Although the above cited errors by Petitioner's counsel occurred only at periodic phases during the trial, counsel's most grievous

error occurred throughout the trial. The government's main theory at trial was that Petitioner was a co-conspirator in a scheme meant to defraud investors. In its effort to convict Petitioner, the government produced countless witnesses who testified as to alleged conversations with co-conspirators, and other investors (Tr. 229, 293, 324, 330, 448, 572, 595, 708, 804, 806, 810, 814, 815, 817, 881, 906). The rule regarding hearsay testimony of co-conspirators is well settled in *United States v. Radeker*, 664 F. 2d 242 (10th Cir. 1981). In *Radeker*, the court held: "a co-conspirator's hearsay statement is not admissible unless the trial judge finds three facts by a preponderance of the evidence. The trial judge must determine that the conspiracy existed, that the declarant and the particular defendant were members of the conspiracy, and that the statement was made during the course of and in furtherance of the conspiracy." *Id.* at 243 (citing *United States v. Andrews*, 585 F. 2d 961 (10th Cir. 1978). The *Radeker* further cited the *Andrews* case stating, "testimony, otherwise hearsay, offered against a co-conspirator cannot be admitted unless the existence of the conspiracy is established by independent evidence." *Id.* at 244 (quoting *Andrews*, 585 at 966). In the case at bar, the government prosecutrix was consistently allowed by the trial court to admit into evidence alleged acts and declarations of alleged co-conspirators and others under the guise of a cautionary instruction "subject to later link-up" (Tr. 210, 381, 553, 739, 831). The prosecutrix failed to link-up these witnesses' statements to Petitioner's actions and did not provide the independent basis required by the *Andrews* case (Tr. 1130-1135, 1856-1858, 2712). Furthermore, defense counsel failed to make appropriate hearsay objections at trial. The objections that were made by defense counsel were focused primarily upon relevancy of testimony and documents being introduced, not co-conspirator hearsay.

(See Appendix 'A' at pg. 8). *See also United States v. Jackson*, 627 F. 2d 1198, 1218-1219 (D.C. Cir. 1980).

The court in *Radeker*, 644 F. 2d at 242, also stated that co-conspirator hearsay is inadmissible only if there is a proper objection by defendant (hearsay). Thus, defense counsel's failure to properly object has been critical. On direct appeal the Petitioner alleged that the co-conspirator hearsay evidence should have been excluded. The Tenth Circuit denied his appeal based on the fact that defense

counsel failed to properly object to any of the hearsay testimony. (See Appendix 'A' at pg. 8). Moreover, relying on this ruling, Petitioner sought to have his sentence vacated by Tenth Circuit on the basis of ineffective counsel. The court ruled that Petitioner's counsel was competent and not ineffective (See Appendix 'C'). The Petitioner now asserts that competent, effective counsel could not have failed to object to volumes of hearsay evidence which infected Petitioner's entire trial and led to a verdict of guilty. Moreover, Petitioner asserts that the Court of Appeals for the Tenth Circuit cannot, consistent with the Sixth Amendment, deny Petitioner reversal based on defense counsel's non-action and, then on post-conviction, state that counsel's non-action constituted effective assistance of counsel. From the foregoing, it is crystal clear that defense counsel has denied the Petitioner effective assistance of counsel by jettisoning his responsibilities onto the shoulders of Petitioner himself. *McMann*, 377 U.S. 773.

CONCLUSION

For the reasons stated above, a Writ of Certiorari should be granted to review the judgment of the United States Court of Appeals for the Tenth Circuit.

Respectfully Submitted,

John W. Sowers, Pro Se

P.O. Box 23026
Oklahoma City, OK 73123
(405) 373-3739

March, 1984

APPENDIX

'A'

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MARCH TERM—March 15, 1982

Before Honorable Oliver Seth, Honorable Stephanie K. Seymour and Honorable John W. Peck*, Circuit Judges.

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	JUDGMENT
	)	
vs.	)	No. 80-1974
	)	or
JOHN W. SOWERS,	)	No. 80-26-T
	)	
Defendant-Appellant.	)	
	)	

This cause came on to be heard on the record on appeal from the United States District Court for the Western District of Oklahoma and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of that court is affirmed. It is the further order of this court that ---------- John W. Sowers, appellant, shall, **within thirty (30) days from and after the date of the filing of the mandate of this court in the district court,** surrender himself to the custody of the United States Marshal for the Western District of Oklahoma in execution of the judgment and sentence imposed upon him.

The District Court may, in its discretion, permit the appellant to surrender directly to the designated Bureau of Prisons institution for service of sentence.

/s/ Howard K. Phillips
HOWARD K. PHILLIPS, Clerk

* Of the Sixth Circuit Court of Appeals, sitting by designation.

APPENDIX

'B'

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

OKLAHOMA CITY, OKLAHOMA

DATE May 24, 1983

United States of America,	)	
	)	
Plaintiff(s)	)	
	)	
vs.	)	NO. CR-80-26-T
	)	
John W. Sowers,	)	
	)	
Defendant(s)	)	

ENTER ORDER

Upon consideration, they being wholly without merit, defendant's Motion for Disqualification of Judge and Review of Defendant's Applications for relief Under Rules 35 and 2255 are denied.

ABOVE ORDER ENTERED BY DIRECTION OF JUDGE RALPH G. THOMPSON

Herbert T. Hope, Clerk

By /s/ Irene Higginbotham,

Deputy

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APPENDIX

'C'

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 83-1626
	)	(D.C. No. 80-26-T)
JOHN W. SOWERS,	)	(W.D. Okla.)
	)	
Defendant-Appellant.	)	

ORDER AND JUDGMENT

Before SETH, Chief Judge, McKAY and SEYMOUR, Circuit Judges.

In accordance with 10th Cir. R. 9(e) and Fed.R.App.P. 34(a), this appeal came on for consideration on the briefs and record on appeal.

This is an appeal from an order of the district court dismissing the appellant's motion to vacate, set aside, or correct sentence filed pursuant to 28 U.S.C. § 2255. The appellant was convicted of Conspiracy, Mail Fraud, Wire Fraud, Interstate Travel in Aid of a Fraudulent Scheme and Interstate Transportation of Property Obtained by Fraud. He alleged in his motion four grounds for relief: 1) prejudicial joinder of alleged coconspirators; 2) various instances of ineffective assistance of counsel; 3) bias of the trial judge; and 4) prosecutorial vindictiveness.

The first issue was raised in the appellant's direct criminal appeal. *See* United States v. Sowers, Unpublished No. 80-1974 (10th Cir. filed March 15, 1982). Absent an intervening change in law "[a]n issue disposed of on direct appeal will generally not be reconsidered on a collateral attack by a motion pursuant to 28 U.S.C. § 2255." United States v. Nolan, 571 F.2d 528, 530 (10th Cir. 1978).

As for the appellant's second contention, we have reviewed the record and conclude that the appellant was not denied the effective assistance of counsel at trial, Dyer v. Crisp, 613 F.2d 275 (10th Cir.),

cert. denied, 445 U.S. 945 (1980), or subsequently, Ross v. Moffitt, 417 U.S. 600 (1974). The allegations consist of complaints about tactical decisions. "Mistakes of judgment on the part of counsel, or mistakes of tactics, strategy or policy in the course of a criminal trial do not constitute grounds for a later collateral attack pursuant to Section 2255." United States v. Nolan, 571 F.2d at 534. *See* 10th Cir. R. 17(b).

Nor is there anything in the record to support the appellant's claims of judicial bias and prosecutorial vindictiveness.

The judgment of the United States District Court for the Western District of Oklahoma is AFFIRMED.

The mandate shall issue forthwith.

/s/ Howard K. Phillips
HOWARD K. PHILLIPS, Clerk

APPENDIX

'D'

State of Oklahoma)
) ss: AFFIDAVIT
County of Oklahoma)

I, John Wilbur Sowers, do hereby depose and state:

1. I provided defense counsel, William Burkett, a list of critical witnesses at least eight weeks prior to trial. He charged $500, which was paid, for the services of Mr. Bob Hammer, a private investigator, to contact and interview same. The week the trial commenced, Burkett upon my inquiry advised me that Hammer had not taken the case and had not interviewed my witnesses. The single most critical witness, Mohammed Moghbel, Norman, Oklahoma, was a nationally recognized art restoration expert for major United States museums who had examined four of the broken sculptures over a period of months. Moghbel stated his opinion that they were very, very old. An opinion I valued and which was the basis upon which I invested $250,000 personally in the project. Mr. Burkett did not interview Moghbel nor call him as a witness.

2. The prosecutrixes, Pence and Pritchett, continually misstated facts, distorted evidence, and lied to the judge and jury. One such critical blatant statement in the final argument was to 'the fact', not in evidence, and absolutely false, that I had the Bolton collection of stone sculptures, those invested in by the government's witnesses, in my sole name and control. They knew this was a falsehood. They further manipulated the daily press reporting by taking the young impressionable courthouse reporter at days' end to their office where they filled his notes with prosecutorial flavored versions of the day's testimony during the periods of excessive absence of the reporter from the proceedings. Pritchett was also seen talking to juror Kay Bolles in the courtroom corridor during the trial which both Pritchett and Pence denied. They were observed by numerous persons including defense counsel. The jurors were observed carrying the daily newspaper into the jury room. Finally, prosecutrix was observed making more than twenty direct misquotes of the record in their 10th Circuit Abstract of the Record which is professionally inexcuseable and typical of their ethical disregard for Petitioner's constitutional right during the trial to a "fair trial".

3. Burkett, defense counsel, failed to advise Petitioner that he was inexperienced in criminal defense undertakings. At sentencing of Peti-

tioner, Burkett admitted to the court and to Petitioner this fact, after the fact, which is in the record.

4. The voir dire was conducted entirely by the trial judge in a matter of less than two hours. Burkett did not ask one question of one juror. Burkett waived eleven peremptory challenges of the Petitioner. Burkett was ineffective, knew it,and secreted this critical fact from Petitioner until too late for Petitioner to secure competent criminal defense counsel.

5. The prosecution denied wire tap and mail interception. Petitioner will go to his grave knowing they lied about both. The above and foregoing facts are true and correct to the best of my knowledge and belief.

/s/ John Wilbur Sowers
John Wilbur Sowers

Subscribed and sworn to before me this 7th of March, 1984.

/s/ Baree Earp
NOTARY

My commission expires: Jan. 27, 1988.

LINN, HELMS, KIRK & BURKETT
ATTORNEYS AND COUNSELORS AT LAW
SUITE 410 FIDELITY PLAZA
ROBERT S. KERR AT ROBINSON
OKLAHOMA CITY, OKLAHOMA 73102

May 29, 1980

AREA CODE 405
239-6781

John W. Sowers
1200 Douglas
Wichita, KS 67202

RE: USA v

2- -80	February Xerox — 97 @ 25¢	$	24.25
3- -80	March Xerox — 340 @ 25¢		85.00
4-09-80	Letter to Mr. Sowers		31.25
4-10-80	Review of documents; Preparation		312.50
*4-14-80	Paid Bob Hammer, retainer		500.00
*4-14-80	Conference with John; Conference with Bob Hammer		375.00
4-14-80	Conference with client and Wm. R. Burkett; Conference with Bob Hammer		210.00
4-15-80	Call to John Sowers, go to FBI office		315.00
4-16-80	Conference with client; Call to Suzie Pritchett; Conference with Wm. R. Burkett; Call from Kosovsky		150.00
4-17-80	Conference; Call to Dr. Kelly; Call to Garvin Isaacs; Conference with Wm. R. Burkett		265.00
4-17-80	Conference with Neil Kosovsky et al; Preparation; Telephone conference with Suzie Pritchett; Telephone conference		625.00
4-21-80	Call to Lee Turner		30.00

LINN, HELMS, KIRK & BURKETT

4-22-80	Research on Motions; Conference with Suzie Pritchett; Call from John Sowers; Call to Richard Rumsey Call to Errol Myers	$ 240.00
4-23-80	Call from Errol Myers; File Motions and briefs	510.00
4-24-80	Travel to Wichita; Conference with Dick Rumsey, Lyle Baker, John Sowers, Ed Dwire; Don Satterthwaite	600.00
4-25-80	Conference with Bill Middeton, John Sowers	240.00
4-28-80	Call from Mr. Isaacs, Call to John Sowers; Call from Mr. Isaacs; Conference with Suzie Pritchett	90.00
4-29-80	Call from Linda Pence; Conference with Wm. R. Burkett	45.00
4- -80	Call to John Sowers	25.61
5-01-80	Appearance at Motions Court	135.00
5-02-80	Draft Journal Entry; Call to Suzie Pritchett; Conference with Garvin Isaacs and Onid Kosvosky	60.00
5-05-80	Call to John Sowers	30.00
5-06-80	Call to Linda Pence; Call from Pence; Call to John Sowers; Call to Isaacs	75.00
5-07-80	Call from John Sowers; Call to John Sowers; Call to Pence; Call from Pence; Call to Bob Hammer	90.00
*5-08-80	Call from Mr. Isaacs; Call to Mr. Isaacs; Call from Bob Hammer	30.00
5-09-80	Conference with Linda Pence	105.00
5-09-80	Conference with Linda Pence, et al; Review of evidence; Prepare for trial	250.00

LINN, HELMS, KIRK & BURKETT

5-12-80	Call from Garvin Isaacs; Conference with Wm. R. Burkett; Call to John Sowers; Call from John Sowers; Call from Garvin Isaacs; Call to Suzie Pritchett; Call from Garvin Isaacs	$ 75.00
*5-12-80	Paid William Skepnek's transportation and expenses to Topeka, Interview clients	152.83
5-14-80	Call from Linda Pence; Call to Erroll Myers	30.00
	Total Due	$ 5,706.44
	Balance Forward, Credit Balance	(8,845.00)
	Balance Due, Credit Balance	$(3,138.56)

No. 83-1655

In the Supreme Court of the United States

OCTOBER TERM, 1983

JOHN W. SOWERS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

JANIS KOCKRITZ
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether petitioner was denied effective assistance of counsel at trial.

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TABLE OF AUTHORITIES

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OPINION BELOW

The judgment order of the court of appeals (Pet. App. C1-C2) is unreported. The opinion of the district court is not reported.[1]

JURISDICTION

The judgment of the court of appeals was entered on January 12, 1984. The petition for a writ of certiorari was filed on March 14, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1]Petitioner did not include a copy of the district court's opinion of May 6, 1983 in the appendix to his petition for a writ of certiorari. We have lodged a copy of that opinion with the Clerk of this Court.

STATEMENT

In 1980, after a jury trial in the United States District Court for the Western District of Oklahoma, petitioner was convicted of one count of conspiracy to defraud, in violation of 18 U.S.C. 371; one count of wire fraud, in violation of 18 U.S.C. 1343; one count of mail fraud, in violation of 18 U.S.C. 1341; two counts of causing fraudulently taken property to move in interstate commerce, in violation of 18 U.S.C. 2314; and one count of causing a person to travel in interstate commerce for a fraudulent purpose, in violation of 18 U.S.C. 2314. Petitioner was sentenced to concurrent terms of two and one-half years' imprisonment on each count. The court of appeals affirmed his convictions (Pet. App. A1). On March 7, 1983, petitioner filed a motion under 28 U.S.C. 2255 seeking to have his conviction vacated. The district court denied relief (Pet. App. B1), and the court of appeals affirmed (Pet. App. C1-C2).

1.a. The evidence adduced at trial is set out in the unpublished opinion of the court of appeals on direct appeal (*United States* v. *Sowers*, No. 80-1974 (10th Cir. Mar. 15, 1982), slip op. 2-7):

> This case involves a plan to ship alleged Mayan antiquities from Guatemala to Brussels. In January of 1975 [petitioner] contacted Robert Bolton, a managing partner in an art sales company in Oklahoma City, about a business opportunity in pre-Columbian art. [Petitioner] explained that the venture promised millions of dollars in profits. Mr. Bolton later met in Dallas with [petitioner] and a Mr. Ovid Kosovsky who claimed to be an archeologist. Mr. Kosovsky told Mr. Bolton that he had discovered a series of caves in Guatemala that contained 960 ancient Mayan stone carvings known as "stelae." He said that buyers in Brussels were willing to purchase the stones but funds

were needed to remove the artifacts from the mountains and crate and ship them to Brussels. He also said that they expected further profits from a documentary that Mr. Kosovsky was preparing in connection with NBC and National Geographic Magazine.

Later [petitioner and] Messrs. Bolton and Kosovsky met in Oklahoma City to enter into an agreement. [Petitioner] drafted two documents. One was an agreement between Mr. Bolton and Mr. Kosovsky whereby Mr. Bolton agreed to invest $79,000 in return for a 45% interest in the project. He also executed an "escrow" agreement designating himself as the escrow agent with a 10% interest in the project.

Shortly thereafter, Mr. Bolton and his employee, Carol Fife, went to Miami to place some of the stones in a warehouse as security for the agreement. Mrs. Fife examined the stones and told Mr. Bolton that they appeared to be carved with a modern tool and some appeared to be molded. This opinion was relayed to [petitioner,] who told Mr. Bolton that Mrs. Fife did not know what she was talking about, and assured him that there was nothing to worry about. So Mr. Bolton provided $5,000 to place the stones in the warehouse.

The next month Mr. Bolton wired $4,500 to Mr. Kosovsky in Guatemala in accordance with [petitioner's] instructions. Thereafter Mr. Bean, Mr. Bolton's business partner, took several stones to Dr. Michael Coe, a professor at Yale University and a leading expert in pre-Columbian art. Dr. Coe told him that the stones were not authentic. This was repeated to Mr. Bolton who immediately told [petitioner]. [Petitioner] was angered as he considered this to be a breach of the confidentiality required by the agreement. [Petitioner] apparently contacted Mr. Kosovsky, then told Mr. Bolton that he never should have contacted Dr. Coe.

Despite the opinions that the stones were fabricated, Mr. Bolton began soliciting more funds for the project. [Petitioner] wrote a letter for him to assist in obtaining funds. Mr. Bolton arranged for three potential investors to meet in his office with him and [petitioner]. At that meeting [petitioner] discussed the project in detail and indicated that the stones had been authenticated in [a] writing which was in his office. He also mentioned that NBC had contracted to do a documentary on the project which would provide $250,000 in profit.

After this meeting, [petitioner] left for Guatemala to arrange the shipping of the stones to Brussels. He met with a shipper and lawyer to enter into a contract to package and ship "copies of Maya stelae" that were "fabricated in Jocotan." The contract also said that he would buy the stones from a "factory in Jocotan." He testified that he did not know about those terms since the contract was in Spanish and he depended upon Mr. Kosovsky to translate for him.

After the contract was executed [petitioner] called Mr. Bolton from Guatemala to inform him that the project was going better than expected and that the shipping was in order. Mr. Bolton had given him a signed blank check for shipping. During the phone conversation, Mr. Bolton told him to make the check payable to Eduardo Hecht for $12,000 to cover shipping charges.

Before [petitioner] left Guatemala he met with Abraham Reyes Lopez, a sculptor living in Jocotan. Over the years Mr. Kosovsky had hired Mr. Lopez to cut stones. Mr. Kosovsky had ordered over 600 stones. To pay for these orders [petitioner] gave the sculptor two checks totaling $11,000 and Mr. Kosovsky gave him a $4,000 check.

Upon returning from Guatemala [petitioner] met with the three investors again. He told them he had seen the cave site when in fact he had not. He described the cave as filled with "thousands of the pieces of the gods, altars, some Mayan calendars, Mayan books, jade, [and] pottery." He showed them photographs of artifacts he said had been taken at the site. The investors then entered into an agreement with Mr. Bolton to invest a total of $25,000 with $12,500 being payable immediately. Other investments were secured to help cover the costs of shipping the stones out of Guatemala.

Following these investments Mr. Bolton traveled to Guatemala, and upon arrival gave Mr. Kosovsky a check for transporting the stones to Brussels. After the completion of his trip, Mr. Bolton apparently became convinced that the project was a fraud. However, he continued to accept investments without telling of his suspicions. Meanwhile he continued to attempt to have the stones authenticated. Three experts concluded that the stones were not Mayan antiquities. Mr. Bolton told [petitioner] of these findings but he rejected them telling Mr. Bolton that he was going to ruin the whole project by trying to get the stones authenticated.

[Petitioner] continued to approach investors including a Mr. Brouse who invested $6,000 in the project after being told that the project was an excellent and valid investment. Later [petitioner] assured Mr. Brouse that an expert would authenticate the objects as soon as they arrived in the United States.

[Petitioner] told Mr. Bolton that he had breached his contract with Mr. Kosovsky because he had failed to pay the $79,000 balance. Mr. Bolton responded that since he could not get the pieces authenticated he could not raise any more money so he wanted out. Thereafter

> [petitioner] contacted other investors attempting to replace Mr. Bolton. Additionally, he circulated brochures and letters to potential investors and interior designers attempting to sell both "genuine Mayan artifacts" and decorations. All these solicitations were with the knowledge that several experts had concluded the stones were not really Mayan antiquities and none had said they were genuine.

b. On direct appeal, the court of appeals, after carefully examining the evidence on each count, found the evidence sufficient to support the conviction on each. *United States* v. *Sowers*, slip op. 8-15. The court also held that petitioner could not challenge the allegedly erroneous admission of hearsay because counsel did not object at trial (*id.* at 7-8). Finally, the court determined that the trial court did not act improperly in declining to declare a mistrial when it learned that an alternate juror, after he had been discharged, had discussed the status of the jury's deliberations with three jurors (*id.* at 15). The court of appeals noted that the district court had inquired into the effect of the conversations through in-chambers questioning of the jurors, the alternate juror, and petitioner and his wife, and that all of the jurors had said that they knew of no reason why they could not render a fair and impartial verdict. On this basis, the district court ~~the~~ determined that no influence had been exerted over the jurors and that there was no basis for disqualifying any of them. In the court of appeals' view, the district court's inquiry clearly established that the communications did not concern the substance of the jury's deliberations and revealed nothing more than the fact that the jury was deadlocked — a fact already announced by the district court. For this reason, the court of appeals concluded that the communications were harmless. *Id.* at 17-19.

2.a. On March 7, 1983, petitioner filed a motion under 28 U.S.C. 2255 to vacate his conviction and sentence, contending, inter alia, that he had received ineffective assistance of counsel at trial. The district court denied relief, finding petitioner's claim of ineffective assistance of counsel to be "wholly without merit." *United States* v. *Sowers, supra* note 1, slip op. 7. It noted that petitioner's retained counsel were "highly competent, respected members of the bar" and that, based on its observations at trial, counsel's representation "was both competent and effective" (*id.* at 3). The court further observed that petitioner's allegations of ineffective assistance were "largely conclusory" and mostly related to matters of "trial strategy," for which counsel requires wide latitude (*id.* at 3-4). The district court also found no merit in petitioner's allegations of prosecutorial misconduct, improper joinder of co-conspirators, and judicial bias (*Id.* at 5-7).

b. The court of appeals affirmed in a brief order. After reviewing the record, the court determined that petitioner had not been denied effective assistance of counsel. It noted that petitioner's allegations consisted of complaints about counsel's tactical decisions, which, the court explained, do not warrant relief on collateral attack. The court also concluded that petitioner's claim of prejudicial joinder of alleged co-conspirators had been raised on direct appeal and would not be reconsidered on collateral attack and that there was nothing in the record to support his claims of judicial bias and prosecutorial vindictiveness. Pet. App. C1-C2.

ARGUMENT

Petitioner's contention (Pet. 8-15) that he received ineffective assistance of counsel at trial was correctly rejected by the courts below and does not warrant further review by this Court. As the Court recently observed, "[t]he benchmark for judging any claim of ineffectiveness must be whether

counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland* v. *Washington*, No. 82-1554 (May 14, 1984), slip op. 16. "When a true adversarial criminal trial has been conducted — even if defense counsel may have made demonstrable errors — the kind of testing envisioned by the Sixth Amendment has occurred." *United States* v. *Cronic*, No. 82-660 (May 14, 1984), slip op. 8 (footnotes omitted). There can be no claim here that petitioner did not have the benefit of a "true adversarial criminal trial." Petitioner concedes "that defense counsel made numerous objections at trial, cross-examined witnesses, and presented evidence" (Pet. 10), and he correctly recognizes that "these practices are factors that weigh heavily in the court's determination of whether counsel has acted reasonably and competently" (*ibid.*).

Petitioner nevertheless contends that the assistance counsel rendered was constitutionally inadequate in particular respects. In order to establish entitlement to relief based on alleged errors of counsel, the convicted defendant must satisfy a stringent two-part test. First, he must show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment" (*Strickland* v. *Washington*, slip op. 17) — *i.e.*, he must overcome the "strong presumption" that counsel's conduct fell within the "wide range" of reasonable professional assistance (*id.* at 19). Second, the defendant must show that counsel's deficient performance in turn deprived him of a fair trial and a reliable result (*id.* at 17) — *i.e.*, he must establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" (*id.* at 24). Petitioner has not met these burdens.

1. Petitioner first contends (Pet. 10-11) that counsel erred in failing to interview a restoration expert, Mohammed Moghbel, who, he maintains,[2] expressed an opinion in 1975 that the stone sculptures were very old. Petitioner has not produced an affidavit of Moghbel to corroborate this assertion or established the reasons for counsel's failure to interview him, if in fact he did not do so. Moreover, even assuming that Moghbel did examine stones that were the subject of the indictment, there is no reasonable probability that this evidence would have altered the verdict. The record is replete with evidence of instances in which petitioner learned of the stones' inauthenticity from various experts during the course of his scheme, and yet he continued to promote them as a worthy investment. See pages 3-6, *supra*; see, *e.g.*, Tr. 221, 590-593, 1580-1581. Hence, any testimony that petitioner might have heard an opinion in 1975, perhaps at the beginning of the investment scheme, that the stones were old would hardly have caused the jury to alter its verdict. In addition, a decision not to call Moghbel might have been a reasonable trial tactic, in view of petitioner's defense that he relied totally on Kosovsky's account of the discovery of the Mayan site. See Tr. 2212, 2578, 2760, 2775.

2. Petitioner next contends (Pet. 11-12) that counsel was ineffective in failing to pursue certain instances of jury misconduct. But as petitioner concedes (Pet. 11), counsel in fact *did* move for a mistrial based on the incident in which an alternate juror had discussions with three jurors about the status of the deliberations (see page; Tr. 2911, *supra* 6). In contending that this action was insufficient, petitioner relies on comments to the alternate juror by one juror indicating that another juror, who was black, may have

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[2]See Pet. 10; Motion for Expanded Rule 2255 Response, Supp. # 1, at 4, filed in district court.

been set in his ways and that he might cause the jury to become deadlocked. See Pet. 12 (citing Tr. 2856, 2871). But these comments in fact were brought out during the district court's in-chambers inquiry that was triggered by defense counsel's action in bringing the alternate juror's communications to the court's attention. Compare *Smith* v. *Phillips*, 455 U.S. 209 (1982). Counsel also challenged the district court's handling of this incident on direct appeal, and the court of appeals rejected the claim. Accordingly, there is no occasion to reexamine on collateral attack the district court's and court of appeals' disposition of this issue (*Kaufman* v. *United States*, 394 U.S. 217, 227 n. 8 (1969)), even though petitioner now has recast it as a claim of ineffective assistance of counsel. Nor is there any reason to believe that the one juror's passing reference to the race of another or his speculation that the latter juror might prove stubborn in deliberations reflected any significant hostility toward him among the other jurors, much less that any such hostility would have been transferred to petitioner, as he now asserts (Pet. 12).

3. Petitioner further maintains (Pet. 12-13) that counsel was ineffective in failing to object to what he asserts were instances of misconduct during the prosecutor's closing argument. In these Section 2255 proceedings in district court, petitioner raised prosecutorial misconduct as a separate substantive issue, quite aside from any inaction by defense counsel in response thereto. The district court, however, rejected his assertions as "conclusory, virtually in their entirety," and held that "such factual allegations as are made are wholly insufficient to implicate any of [petitioner's] fundamental Constitutional rights in any material respect." *United States* v. *Sowers, supra*, note 1, slip op. 5. The court of appeals likewise found nothing in the record to support petitioner's claim of prosecutorial vindictiveness (Pet. App. C2). Since petitioner does not challenge the

conclusion by the courts below that alleged instances of prosecutorial misconduct were without merit in their own right, counsel cannot be held to have rendered constitutionally inadequate assistance in failing to object to those instances of alleged impropriety.[3]

4. Finally, petitioner contends (Pet. 13-15) that counsel rendered constitutionally inadequate performance because he did not object at trial to the admission of what petitioner asserts was hearsay evidence. This contention is without merit. On several of the occasions petitioner cites (Pet. 14), counsel in fact *did* raise an objection on hearsay grounds (Tr. 229, 293).[4] In addition, as petitioner concedes (Pet. 14), the district court repeatedly gave a cautionary instruction about the jury's consideration of co-conspirators' statements (Tr. 210-211, 381, 553-554, 831-832), and counsel several times requested such an instruction (Tr. 739, 817, 908).

Moreoever, even as to those instances in which an objection was not made, petitioner has wholly failed to show that counsel's actions were outside the wide range of professional competence or that there is a reasonable probability that those actions affected the outcome. Under either of

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[3]Petitioner contends that during closing argument, the prosecutor referred to him as a "liar" and a "phoney." See Pet. 13 (citing Tr. 2718, 2727, 2733). However, on the first two of these three occasions, the prosecutor stated that investors were told "lies" as part of the scheme — hardly a surprising observation in a case in which the defendant is charged with fraud offenses. On the third occasion, the prosecutor simply described petitioner's purportedly innocent explanation for his fraudulent conduct as "phoney." There is no reason to believe that this isolated observation had any significant adverse impact on petitioner.

[4]On the first occasion the court overruled the objection without explanation (Tr. 229), and on the second it allowed the testimony because it was not offered for the truth of the matters asserted in the conversation and therefore was not hearsay (Tr. 294). See Fed. R. Evid. 801(c).

those prongs of the inquiry, it would be necessary as a threshold matter for petitioner at least to show that particular evidence would have been excluded if counsel had objected; otherwise there would have been no error — much less a significantly prejudicial error — in the trial. But petitioner has not even made this threshold showing. Several of the transcript pages cited by petitioner contain testimony regarding statements made by petitioner himself (see Tr. 330, 448, 572-573, 708), which obviously would not be excludable as hearsay. Fed. R. Evid. 801(d)(2)(A).[5] Other of the testimony concerned statements made by coconspirators to potential investors that the government alleged were falsely made as part of the fraudulent scheme (Tr. 795, 804-811, 813-815); they therefore obviously were not offered for the truth of the assertions they contained and thus were not hearsay. See *Anderson* v. *United States*, 417 U.S. 211, 219-220 (1974); Fed. R. Evid. 801(c). But even assuming that some bits of evidence were erroneously admitted and assuming further that counsel's failure to object was outside the wide range of reasonable professional competence, petitioner has not shown any reasonable probability that the jury's verdict would have been different if the evidence had been excluded. The substantial evidence against petitioner consisted primarily of his own

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[5]At another page of the transcript cited by petitioner (Tr. 324), a witness was simply reading an exhibit that previously had been admitted into evidence (see Tr. 317) (a decision petitioner does not challenge), and the witness was asked when he first had seen another exhibit. We do not understand what objection counsel should have made at that point. Another transcript page cited by petitioner (Tr. 881) contains testimony of a Guatemalan witness, elicited by defense counsel on cross-examination, about his acquaintance with and knowledge of coconspirator Kosovsky in Guatemala. The incident seems trivial, and petitioner in any event has not shown that defense counsel's elicitation of the testimony was not a reasonable tactical decision.

false, fraudulent, or misleading statements made to investors. There is no reason to believe that the additional evidence petitioner now identifies might have had a decisive impact on the jury or, consequently, that the asserted errors by counsel deprived petitioner of a fair trial and a just and reliable result. See *Strickland* v. *Washington*, slip op. 16-17, 24-25, 30.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

JANIS KOCKRITZ
Attorney

JUNE 1984

DOJ-1984-06